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In The

Supreme Court of the United States

October Term, 1996

D. DEAN BIBLES, OREGON STATE DIRECTOR
BUREAU OF LAND MANAGEMENT,

Petitioner,

v.

OREGON NATURAL DESERT ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted when the court of appeals applied the correct test in determining that Exemption 6 of the Freedom of Information Act, 5 U.S.C. section 552(b)(6), does not authorize the Bureau of Land Management to withhold a newsletter mailing list?

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OPINIONS BELOW

The opinions of the district court and the court of appeals in this case are set out in the appendix to the petition for certiorari.

JURISDICTION

Respondent does not contest the Petitioner's statement of jurisdiction.

STATUTORY PROVISIONS

Respondent agrees with Petitioner that the only statutory provision involved in this case is Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6). Exemption 6 states that the disclosure requirements of FOIA do not apply to: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the procedural posture of this case. To the extent that Petitioner's statement implies that the court of appeals considered the uses to which the requested documents would be put in determining whether release of the

documents was in the public interest, Respondent disagrees with Petitioner's statement.

REASONS FOR DENYING CERTIORARI

The court of appeals in this case correctly applied the test developed by this Court in *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 776 (1989) and *Department of Defense v. FLRA*, 510 U.S. 487 (1994), for FOIA Exemption 6 claims. There is no inter-circuit disagreement about the *FLRA* test or its proper application. In fact, Petitioners do not argue that the court of appeals applied the wrong test or that there is an inter-circuit disagreement about the test. Petitioners argue only that the test was applied incorrectly to the facts of this particular case. Even if true, this would not be a basis for granting a writ of certiorari.

When presented with a claim that Exemption 6 allows an agency to withhold documents otherwise subject to FOIA, "a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect." *Reporters Committee, supra*, 489 U.S. at 776.[1] In *FLRA*, the Court clarified that the uses to

[1] Exemption 6, like the other enumerated exemptions to FOIA, is to be interpreted narrowly, not broadly, and any doubts as to whether requested documents are exempt should be resolved in favor of disclosure. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *Department of State v. Ray*, 502 U.S. 164, 173 (1991).

which requested documents will be put cannot be considered in evaluating "the public interest in disclosure." *Id.* Rather, "the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties or otherwise let citizens know 'what their government is up to.'" *FLRA, supra*, 510 U.S. at 497 (quoting *Reporters Committee, supra*, 489 U.S. at 773).

The court of appeals expressly followed *Reporters Committee* and *FLRA* in this case. *See* App. at 5a-8a.[2] The court first examined the privacy interest asserted by the BLM and agreed with the district court that the privacy interest was "minimal" because the majority of people on the BLM's mailing list had "affirmatively indicated their interest in receiving mailings on subjects related to ONDA's interest in this case." App. at 7a. The court then considered the public interest in disclosure and again agreed with the district court that there was a cognizable public interest in knowing to whom the government is directing information when it sends out documents, such as newsletters, that "present[ ] government activities in the most favorable light." App. at 6a.

[2] Although the district court applied a four factor test developed by the Ninth Circuit prior to the *FLRA* opinion, the district court based its decision on the two parts of that test that survived the *FLRA* decision. In fact, the district court rejected the BLM's Exemption 6 claim primarily because "the privacy interests implicated in this case are minimal. . . . " App. 19a. The court's focus on the degree of invasion of privacy was perfectly consistent with *FLRA*.

Petitioner does not argue that the court of appeals ignored, misinterpreted, or misstated the analysis required by *Reporters Committee* and *FLRA*. *See, e.g.*, Petition at 7 ("[t]he court of appeal acknowledged . . . *FLRA* [and] . . . *Reporters Committee* . . . "). Petitioner argues, however, that the court of appeals incorrectly *applied* the *Reporters Committee* and *FLRA* opinions. As explained *infra*, this argument is wrong. Even if Petitioner was correct, however, the Court should not grant certiorari merely to review the application of a properly articulated rule to the facts of a particular case. Had the court of appeals misstated or attempted to modify the *Reporters Committee* and *FLRA* opinions, or disagreed with other circuits' interpretation of those opinions, perhaps certiorari should be considered. That, however, did not happen here.

I. The Court of Appeals Properly Found that There Is a Public Interest in Disclosure of the Requested Information

The court of appeals began its analysis by properly noting that in evaluating the "public interest" in disclosure, "recent Supreme Court cases [hold that] we should no longer consider . . . the plaintiff's particular interest in the requested information, as militating for or against disclosure." App. at 4a. The court of appeals also noted that "the only relevant interest in disclosure is the public's interest in understanding government operations or activities." App. at 5a (citing *FLRA*). The court then found:

> there is . . . a substantial public interest in knowing to whom the government is directing information, or as ONDA characterizes it, "propaganda," so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light.

App. at 6a.

Petitioner emphasizes the second part of the statement and ignores the first. *See* Petition at 15-16. The conclusion that there is a "public interest in knowing to whom the government is directing information" is perfectly consistent with this Court's holdings that there is a public interest in opening "agency action to the light of public scrutiny." *Reporters Committee, supra*, 489 U.S. at 772. The fact that other consequences might follow from such a revelation does not detract from the public interest in the initial disclosure.

Petitioner admits that "the court of appeals . . . acknowldge[d] the limited nature of the public interest that can be considered under the FOIA," (Petition at 15) but argues that the statement quoted above is evidence that the court of appeals considered, "as part of the public interest, respondent's interest in providing persons on the BLM *News* mailing list with additional information." Petition at 15-16. This conclusion is not compelled by the quoted statement. Even if it is possible to interpret the statement in the manner suggested by Petitioner, a potential ambiguity in a statement of the court of appeals is hardly a reason for granting certiorari.

II. The Court of Appeals Properly Found that Any Privacy Interest in the Requested Information Is Minimal

Petitioner also argues that the court of appeals did not give sufficient weight to the privacy interests of recipients of the BLM *News*. Petition at 20-28. Petitioner acknowledges that, as noted by the court of appeals, the majority of individuals on the BLM *News* list are there because they want to be. Petition at 26; App. at 6a-7a. Petitioner argues, however, that the court gave too little weight to "the interest that individuals have in preventing at least some unsolicited, unwanted mail from reaching them at their homes." *FLRA*, 510 U.S. at 501. Petitioner speculates that release of the list may subject individuals on the list to a barrage of unwanted commercial solicitations. Petition at 24-28. There are several problems with Petitioner's argument.

First, in *FLRA* the requested lists contained names and addresses that were required to be submitted to the government. *See FLRA*, 510 U.S. at 493. Individuals on the list therefore had no control over the appearance of their names and addresses on government held lists. In fact, as noted by the *FLRA* court, the majority of the people on the list requested in *FLRA* had affirmatively indicated that they did *not* want their names and addresses released to the requester. *FLRA*, 510 U.S. at 500 ("Here, for the most part, the unions seek to obtain the addresses of nonunion employees who have decided not to reveal their addresses to their exclusive representative.").

In the instant case the people on the requested list are there voluntarily, and no evidence has been presented

that these people want the list withheld from respondent.[3] The fact that the list was compiled by a federal agency that manages public lands does not, in and of itself, reveal any potentially embarrassing information about the individuals on the list. *See Southern Utah Wilderness Alliance v. Hodel*, 680 F. Supp. 37, 40 (D.D.C. 1988) (fact that an individual's name and address appeared on a Park Service list compiled from trailhead registers "carries no opprobrium and is hardly even a private matter . . . "). *Compare Department of State v. Ray, supra* (Haitian immigrants had significant privacy interest where disclosure of names might reveal immigration status); *FLRA, supra* (disclosure would identify to union home addresses of nonunion employees who did not want addresses disclosed to union).

Petitioner's speculation about a potential barrage of commercial mailings is not only unsupported by any evidence – it also ignores this Court's observation (in the First Amendment context) that "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be

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[3] Although Petitioner speculates at length about a parade of horribles that might occur should the requested list be released (Petition at 20-27), Petitioner has made no effort to submit evidence that (1) individuals on the list do not want their names and addresses released *or* (2) there might be some "commercial interest" in the list. At a minimum, given the allocation of burdens of proof under FOIA, Petitioner should have come forward with *some* evidence to support its claims on these points. *See Department of the Air Force v. Rose*, 425 U.S. 352, 380 n. 19 (1976) ("Exemption 6 was directed at threats to privacy more palpable than mere possibilities.")

offended." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983).

Because appearance on the BLM *News* list is not mandatory, individuals can have their names removed from the list at any time. The court of appeals therefore correctly concluded that *FLRA* "supports the district court's conclusion that in this case the invasion of privacy would be minimal." App. at 7a.

Second, accepting Petitioner's privacy argument would create a new, *de facto* exemption from FOIA for all government held mailing lists. A lesser privacy interest than the interest asserted by Petitioner in this case can scarcely be imagined. If the privacy interests of voluntary recipients of government information, who are on a mailing list for a public lands newsletter, are sufficient to invoke Exemption 6, then as a practical matter *all* government held mailing lists would be exempt from FOIA.

Surely if Congress intended a *per se* exemption from FOIA for government held mailing lists, it would have said so. In fact, one would think that if this Court believes there is a *per se* exemption for all government held mailing lists, *it* would have said so. Instead, the Court has recognized that disclosure of a list of names and other identifying information is not "inherently and always a significant threat to the privacy" of named individuals. *Department of State v. Ray, supra*, 502 U.S. at 176, n.12.

The Petitioner's *per se* reading of Exemption 6 is so astonishingly broad that it would create an entire category of exempt documents, despite the absence of any specific exemption for such documents in FOIA. The Court should decline the Petitioner's request to reach out,

take this unexceptional case, and use it as a vehicle to create a new, *de facto*, FOIA exemption.

CONCLUSION

The petition for certiorari does not establish grounds for granting a writ, and the petition should be denied.

Respectfully submitted,

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